Office-Supreme Court, U.S.
FILED
MAY 5 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1447

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NASSER G. AFSHAR,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONER'S REPLY TO RESPONDENT'S MEMORANDUM IN OPPOSITION

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May 5, 1983

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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ARGUMENT

Respondent's Opposition to the Petition for Writ of Certiorari (hereafter Opp.) fails to rebut petitioner's arguments that the decision below conflicts with other decisions in the courts of appeals and raises an important and unsettled question of constitutional law.

1. *Conflict re: proof of an affirmative act of fraud.* Respondent does not even deny that there is a conflict among the circuits with respect to whether the Government must prove an "affirmative act" of fraud under 26 U.S.C. § 6653(b). Instead, respondent argues that the conflict is not presented on the facts of this case.

a. Respondent's suggestion that the court below applied the "affirmative act" standard is contrary to the record. Respondent cites the Tax Court's statements that "the Commissioner must show that the taxpayer intended to evade taxes, which he knew or believed he owed, by conduct intended to conceal, mislead, or otherwise prevent the collection of such taxes," and that "by conduct in-

tended to mislead and conceal his income the petitioner intended to evade tax which he knew or believed he owed." (Pet. App. 39a, 52a.) Those statements merely reiterate the obvious proposition that under § 6653(b) no taxpayer can be assessed civil fraud penalties unless conduct deemed to be fraudulent has occurred. Those statements do *not* say, however, that the indicia of fraud required to establish liability under § 6653(b) must include some *affirmative act* of deception of the taxing authorities. That the court below did not intend in those statements to adopt an "affirmative act" requirement is demonstrated by its reliance (Pet. App. 39a) on *Stoltzfus* v. *United States*, 398 F.2d 1002, 1004 (3d Cir. 1968), *cert. denied*, 393 U.S. 1020 (1969), the very case that expressly rejected the Eighth Circuit's "affirmative act" requirement in favor of a more lenient standard. Since the Tax Court cited for its statement of the governing rule an opinion that rejected an "affirmative act" standard, it obviously did not intend to adopt an "affirmative act" standard.

b. Respondent lists several statements and actions of petitioner's which, according to respondent, could meet the "affirmative act" requirement (Opp. at 4, n.4), but they are not entitled to any consideration in this Court because none of them was accepted by the Tax Court or the court below as having been proved at trial.

The only facts the court below accepted as establishing fraud were: (1) that petitioner's income was obtained under false pretenses; (2) that petitioner had been dilatory in providing information to the taxing authorities; and (3) that petitioner had failed to file returns for the years in question. These factual findings do not meet the "affirmative act" standard.

The Tax Court's conclusion that petitioner's income was obtained under false pretenses is legally irrelevant. Section 6653(b) requires fraud or misrepresentation with respect to the *taxing authorities*, and is not concerned with the sources of petitioner's income.

Similarly, petitioner's delay in providing the requested information was not an affirmative act of fraud. The Tax Court did not find that petitioner engaged in any misrepresentation or concealment with respect to the taxing authorities, or failed to comply with any IRS summons or judicial subpoena.[1]

Finally, petitioner's failure to file returns, even if willful, does not constitute an "affirmative act" of fraud. As the Eighth Circuit held in *First Trust and Savings Bank of Davenport* v. *United States*, 206 F.2d 97, 99 (8th Cir. 1953), civil fraud penalties are inappropriate where the taxpayer's dereliction "consisted only in wilful omission and passive neglect to perform the duty of making returns . . . ." *See also Jones* v. *Commissioner*, 259 F.2d 300 (5th Cir. 1958); *Marsellus* v. *Commissioner*, 544 F.2d 883, 886 (5th Cir. 1977).

The Tax Court did not find that the petitioner engaged in any "affirmative act" of misrepresentation or concealment with respect to the taxing officials. Accordingly, this case squarely presents the conflict between the Fifth and the Eighth Circuits, on the one hand, and the Third and Fourth Circuits, on the other, with respect to whether an "affirmative act" of fraud is a necessary prerequisite to liability under § 6653(b).

2. *Conflict re: burden of proof regarding deductions.* Respondent does not deny that the court below placed on petitioner the burden of proof with respect to the validity of petitioner's business deductions. Respondent argues, however, that the court below was correct in

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[1] Had the IRS wished to obtain tax information from petitioner, it could have issued a summons under 26 U.S.C. § 7602, and could have sought judicial enforcement, including civil contempt sanctions, if petitioner failed to comply. *See United States* v. *Rylander*, 51 U.S.L.W. 4367 (April 19, 1983). It would be inappropriate, when the IRS has not even tried to compel a taxpayer to provide information, to rely on the taxpayer's failure to volunteer information as a basis for imposing civil fraud penalties.

placing the burden of proof on petitioner, and that no conflict among the circuits exists with respect to this issue.

a. Respondent suggests (Opp. 5) that the issue is governed by cases such as *Helvering* v. *Taylor*, 293 U.S. 507 (1935) and *Welch* v. *Helvering*, 290 U.S. 111 (1933), which state that the Commissioner's determination of tax liability is presumptively correct and places on the taxpayer the burden of proving that the Commission's determination is erroneous. These cases, however, are entirely inapposite. Petitioner has never denied that he bore the burden of proving the validity of his claimed deductions insofar as the Commissioner's *deficiency* determination is concerned. But this case raises the quite different question of whether the taxpayer has the burden of proving the validity of claimed deductions in a *fraud* suit.

b. Respondent fails to rebut petitioner's argument that the circuits conflict on whether the Government has the burden of proving the invalidity of claimed deductions in a civil fraud case.

Respondent attempts to distinguish *Considine* v. *United States*, 683 F.2d 1285 (9th Cir. 1982) on the narrow factual ground that the validity of claimed deductions was not at issue in that case. However, the rule announced in *Considine* is clearly at variance with the decision below. The *Considine* court stated that "[t]o establish liability for . . . the civil fraud penalty, the Government must establish . . . an underpayment of tax," and held further that "[a]lthough the burden of proof is usually on the taxpayer in contesting a deficiency, the Government has the burden of proof to establish the elements of the civil fraud penalty by clear and convincing evidence." 683 F.2d at 1286 and n.1.

Similarly ineffective is respondent's attempt to distinguish *Richardson* v. *Commissioner*, 264 F.2d 400 (4th Cir. 1959). Respondent concedes that *Richardson* placed

the burden of proving the invalidity of deductions on the *Government*—a holding directly contrary to that of the court below. But respondent suggests that *Richardson* represents a "limited exception" to a general rule placing the burden on the taxpayer, applicable only to the "special facts" of that case. Opp. at 7-8. Respondent's attempt to distinguish *Richardson* on narrow factual grounds does not eliminate the basic conflict with the decision below.[2]

Finally, respondent fails to explain away (Opp. at 6, n.5) the conflict between the decision below and that of the Tax Court in *Goodwin* v. *Commissioner*, 73 T.C. 215, 229-31 (1979). *Goodwin* held that in a civil fraud suit the burden is on the Commissioner to prove by clear and convincing evidence that the taxpayer underpaid his taxes. After assessing the evidence of record, the court concluded that [the *Commissioner*] *has shown the amount of* [*the taxpayer's*] *deductible expenses* in each year here in issue." 73 T.C. at 230 (emphasis added). The Tax Court thus clearly placed the burden of showing the invalidity of claimed deductions on the Government, not the taxpayer—a result directly contrary to the decision of the court below.

c. The plain language of 26 U.S.C. §§ 7454(a) and 6653(b) establishes that in a fraud case, the burden of proof rests on the Government. Respondent, ignoring this plain language, reads § 7454(a) as stating that the Government has the burden of proof in fraud cases, but *only with respect to the taxpayer's fraudulent intent.* This qualification is not found in the language of

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[2] The *Richardson* court noted the Government's argument that "the burden of *going forward* in establishing the right to the deductions, was on the taxpayers," but the court placed on the Government the burden of *persuasion*, and ruled that "the Commissioner must prove that at least some unreported *net* income resulted from the unrecorded transactions" (264 F.2d at 405; emphasis added).

§ 7454(a), and respondent has not even claimed that such an important qualification can be inferred from the legislative history of that section.

d. Respondent does not deny that the elements of criminal and civil tax fraud are identical, or that a tax deficiency is one element of criminal tax fraud. *See Sansone* v. *United States*, 380 U.S. 343, 351 (1965). Unaccountably, however, respondent suggests that even in criminal fraud cases the burden is on the taxpayer to prove that a deficiency does not exist, and not on the Commissioner to prove that it does. That position is inconsistent with the basic principle that the Government must prove every element of an offense with proof beyond a reasonable doubt. *See Sandstrom* v. *Montana*, 442 U.S. 510 (1979); *In re Winship*, 397 U.S. 358 (1970).

A deficiency occurs when a taxpayer has received taxable income on which he has not paid tax. Taxable income is computed by subtracting deductions from adjusted gross income (and performing certain other calculations not relevant here). Thus, to establish a tax deficiency it is necessary to determine the amount of legitimate deductions.

In criminal tax fraud cases, therefore, one element of the Government's case is to show that a defendant does not have sufficient valid deductions to negate the existence of a deficiency. Since the elements of criminal and civil tax fraud are identical, the invalidity of the taxpayer's claimed deductions is also an element of the Government's *civil* tax fraud case. Accordingly, since under § 7454(a) the Government has the burden of proof in fraud cases, the Government in a civil tax fraud case has the burden of proving that claimed deductions are not valid.

Respondent's position is particularly puzzling in light of the contrary position taken in the Department of

Justice's own *Manual for Criminal Tax Trials* 65 (1973), which has been lodged with the Clerk. The *Manual* expressly states that:

> In order for direct evidence to be effective to establish further tax liability it must be such that it permits a finding by the jury that taxable income is understated. The tax is, of course, computed on the taxable income. In case, therefore, the government has evidence of specific items of income omitted from tax returns, *it must at the same time adduce proof of deductions, business costs and expenses, and exemptions.* (Emphasis added.)[3]

e. Respondent's argument that petitioner has the burden of proving the validity of claimed deductions confuses the concepts of burden of *persuasion* and burden of *production*.[4]

Petitioner has consistently argued that the court below erred in placing on petitioner the burden of *persuasion* with respect to the validity of claimed deductions. Peti-

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[3] Obviously, if the Fourth Circuit was led by the Government to believe that the burden of proof could constitutionally be placed on the taxpayer even in a criminal fraud case, it would not seriously have considered petitioner's additional argument that, in the circumstances of this civil fraud case, it would be unconstitutional to place the burden on the taxpayer. See Point 3, *infra*.

[4] Those concepts, although related, differ in practical and legal effect. The party bearing the burden of production (sometimes referred to as the burden of going forward with the evidence) has the task of introducing sufficient evidence to avoid a directed verdict, *i.e.*, enough evidence to allow a reasonable trier of fact to conclude that he is entitled to prevail in the suit. The party bearing the burden of persuasion, on the other hand, has the task of convincing the trier of fact that it is more likely than not that the facts entitle him to prevail in the litigation. The burden of production can be an issue throughout the trial, and may shift back and forth between the parties; the burden of persuasion comes into play only at the close of the case, and rests on the same party throughout the litigation. Ordinarily, the phrase "burden of proof" refers to the burden of persuasion, not the burden of production.

tioner has never contended that the burden of *production* was improperly allocated by the Tax Court. The taxpayer is almost always in a better position than the Government to introduce evidence concerning claimed deductions. Accordingly, it may be proper to place on the taxpayer the burden to come forward with some evidence as to the validity of his claimed deductions. However, the burden of persuasion on the issue of deductions should be on the Government, just as it is when the taxpayer meets his burden of coming forward with some evidence concerning his gross income.[5]

The distinction between the burdens of production and persuasion is not academic or hypothetical. Petitioner testified extensively and introduced documentary evidence in support of his claimed deductions. Accordingly, he clearly met his burden of production.

f. The cases cited by respondent for the proposition that the taxpayer has the burden of establishing the validity of claimed deductions in fraud cases in fact only place the initial burden of production on the taxpayer. *See* Opp. at 6 (citing *United States* v. *Hiett*, 581 F.2d 1199, 1202 (5th Cir. 1978) (". . . our holding in no way shifts the burden of proof to the [taxpayer]"); and *United States* v. *Bender*, 218 F.2d 869, 871-82 (7th Cir.), *cert. denied*, 349 U.S. 920 (1955) (the government's evidence had "the effect of shifting the burden of *going forward* with the evidence to the defendant." (Emphasis added)). Those cases recognize that the burden of *persu-*

[5] This allocation of the burdens of production and persuasion is similar to the allocation of the burdens of production (on the defendant) and persuasion (on the Government) in cases where a criminal defendant claims self defense or alibi. In all three situations the Government is, in a colloquial sense, required to prove a negative: that the defendant was not acting in self defense; that the defendant did not have an alibi; or that the taxpayer was not entitled to the deductions claimed. *See Mullaney* v. *Wilbur*, 421 U.S. 684, 702 n.30 (1975).

sion with respect to claimed deductions rests with the Government throughout.[6]

3. *The due process issue.* Respondent argues (Opp. at 8, n.6) that the due process issue should not be considered because it was raised "much too late for the issue to be considered a part of this case." However, the issue whether the Tax Court acted properly in quashing petitioner's subpoenas *was* raised below, and is properly presented for review.

Petitioner's counsel argued at trial that the subpoenas should not be quashed, and those arguments were rejected by the Tax Court. Petitioner also raised this issue, as respondent concedes, Opp. at 8, n.6, in his petition for reconsideration of the decision of the Court of Appeals. The Court of Appeals did not deny rehearing on the ground that the due process point stressed in the petition was raised too late. Instead, the Court of Appeals denied the petition on its merits. Accordingly, the due process argument was presented to the court below,[7] and respondent's suggestion that the due process issue is not properly presented to this Court for review is without merit.[8]

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[6] Of course, the Tax Court might have ruled against petitioner even if the burden of persuasion had been properly placed on the Government. But we have no way of knowing how the Tax Court would assess the facts of record based on a proper allocation of the burden of persuasion.

[7] The cases cited by respondent for the proposition that the due process issue is not properly presented to this Court are inapposite. Those cases involved issues that were neither presented to or decided by any lower court. In the present case, in contrast, the due process issue was presented below and was necessarily decided adversely to petitioner.

[8] Even the rule that this Court will not consider issues that were not presented to or passed on by the lower court is not inflexible. In appropriate circumstances, this Court has not hesitated to consider issues raised for the first time in the certiorari petition or jurisdictional statement. *E.g., Vachon* v. *New Hampshire*, 414 U.S. 478, 479 n.3 (1974); *Boynton* v. *Virginia*, 364 U.S. 454, 457 (1960);

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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Pollard v. *United States*, 352 U.S. 354, 359 (1957). Indeed, *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976) (per curiam), the principal case cited on this point by respondent, was a case where this Court decided an issue that was neither raised nor decided in the court below.